IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. E. GLASS,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

No. 2485

WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFF IN ERROR.

F. E. HAMMOND, ESQ.,
Attorney for Plaintiff in Error.

Mutual Life Building,
Seattle, Washington.

KLEMPTNER & BOYCE

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STATEMENT OF THE CASE.

On the 20th day of May, 1912, an indictment was returned charging the defendants, Ridgway and Glass, jointly with having violated Sec. No.

3894 of Revised Statutes, and Sec. No. 213 of the Penal Code of 1910 (Act March 4, 1909).

There are ten counts in the indictment (p. 3 Tr.), the wording of all of which is identical, except as to the composition of the mail matter alleged to have been deposited in the post office establishment. A demurrer was sustained as to counts one (1) and five (5) as being barred by the statute of limitations (Opinion Judge Cushman, p. 23 Tr.) and denied as to all other counts. To which ruling the defendants excepted (p. 48 Tr.). Upon the second trial of the case no evidence was introduced as to counts six (6), eight (8), nine (9) and ten (10), and the court (Judge Neterer) instructed the jury to return a verdict of "Not Guilty" upon said counts (p. 63 Tr.).

The only counts of the indictment upon which evidence was introduced were the second (2), third (3), fourth (4) and seventh (7). (Instruction, p. 63 Tr.)

The indictment (p. 3 Tr.) is as follows (omitting formal parts):

> "That heretofore, to-wit: On or about the 13th day of April, 1909, one W. A. Ridgway and one R. E. Glass, at the City of Seattle, County of King, State of Washington, within the Western District of Washington and within

the jurisdiction of this court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the post office of the United States of America, at said City of Seattle, to be sent and delivered by the post office establishment of the United States, a certain circular concerning a certain scheme dependent upon lot or chance, then and there being operated and conducted within the Western District of Washington by a certain corporation called 'Jovita Land Company,' and which said circular was then and there intended for the purpose of promoting, aiding and furthering the carrying on of the business of said scheme, and which said circular so far as can be represented and set forth herein, omitting therefrom certain pictures and designs, was as follows:

(We omit copying the circulars, as they are different in each count.)

And which said scheme hereinbefore referred to was as follows:

That the said W. A. Ridgway and R. E. Glass should acquire in the name of the Jovita Land Company, a corporation, certain vacant, unimproved lands with King County, in the Western District of Washington, which they should plat and cause to be platted into lots and blocks under the name of Jovita; which said lots should be of different and unequal values; and it was further a part of said scheme to build houses of different values upon twelve of said lots, thereby rendering said lots of more value than the other lots which were unimproved by buildings of any kind; and it was a part of said plan of said defendants to offer said

lots for sale to persons throughout the United States and to enter into contracts with said purchasers, whereby said lots were to be sold to them for the sum of One Hundred and Thirty ($130.00) Dollars each, but at the time of such sale the lot or lots so purchased should not be identified, but after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser by lot and chance, which said drawing was to be conducted on said property under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees, and that after said drawing, a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.''

On June 19, 1913, the defendants were arraigned, pleaded not guilty and went to trial (P. 29 Tr.). This trial was had before Judge Cushman and resultel in a disagrement of the jury.

On December 19th, 1913, the defendants were again put upon trial before Judge Neterer (P. 48 Tr.). The material testimony introduced was as follows, and is copied from the agreed statement in the Transcript (P. 48 to 56 inc. Tr.):

That the defendants, Ridgway and Glass, in the latter part of 1908, on behalf of themselves and other persons, caused to be incorporated, the Jovita Land Company; That the Jovita Land Company acquired

a tract of land between the City of Seattle and Tacoma, Washington, containing about five hundred (500) acres; This property or addition was designated as "Jovita," and was, by the Jovita Land Company, platted into lots and blocks, there being 2713 lots and tracts ranging in size from 40x120 feet to 2½ acres; That after purchasing the property, the Jovita Land Company, proceeded to improve the property by clearing the land, building houses, grading streets, building sidewalks, and otherwise making the property attractive; That the lots and tracts as finally delivered to the purchasers were of unequal size and value; That after platting the land, the Jovita Land Company, of which the defendant, W. A. Ridgway, was President, and the defendant, R. E. Glass, was Secretary and Treasurer, proceeded to sell the land upon contract, each interest in the tract of land being sold for the uniform price of One Hundred and Thirty Dollars ($130.00) each.

In selling the land an undivided interest was sold to each purchaser, and at the time of the sale, the particular lot or lots which the purchasers agreed to buy, were not known or designated, and it was agreed in the contract, which was introduced in evidence as the Government's Exhibit No. Twenty-three (23), that after all the land had been sold, the purchasers or their representatives should meet upon the

property and at that time, the Jovita Land Company would deliver to the purchasers, or their representatives, deeds to all the property so sold by the Jovita Land Company and purchased by the lot buyers, at which time the lot buyers could divide the property among themselves.

For the most part the letters and circulars set forth in the indictment and other literature, were sent out through the mail at times subsequent to the initial contract paymens.

That prior to the 4th day of July, 1910, the Jovita Land Company caused notice to be given to the alleged lot buyers of the selection and appointment of certain representatives who would act for the contract holders and who were requested to meet on said date and be present on the land of the company; that on the date last mentioned a meeting was had at which were present these representatives, together with many other contract holders of the company, several hundred in number. Between 8:00 or 9:00 o'clock in the morning the defendant, W. A. Ridgway, announced to the purchasers there assembled that the Jovita Land Company was ready to turn over the deeds to the Trustees whom might be chosen by the people there assembled. By viva voce vote five Trustees were chosen from among the per-

sons present. These Trustees were then called forward, and the defendant, W. A. Ridgway, delivered to these Trustees deeds to each and every lot or tract of the property sold, and took their receipt for the same. These deeds covering substantially all of the 2713 lots to be distributed had, prior to the drawing, been prepared and signed and acknowledged by the defendant, W. A. Ridgway. These deeds were executed in blank form as to the name of the grantee in each case. On the day of the drawing many of these deeds so prepared were by the employes of the company at the time filled in and actually distributed to the grantees selected by lot at the drawing and thereafter from time to time the remaining number of deeds were sent through the mails and distributed from the offices of the Company to the various and numerous alleged purchasers in various parts of the district and surrounding country. After these deeds were delivered to the Trustees, the defendant, Ridgway, withdrew from any further participation in the subsequent proceedings and went to Tacoma, Washington, but subsequently during the day returned to the property. The defendant, Glass, was present at his home, but not personally present at the drawing.

That the defendant, R. E. Glass, was almost continually during the existence of the Jovita Land

Company from its inception down to the day of the drawing and for some time thereafter present in both the offices of the company and on the land of the company at Joivta. The location of the land at Jovita is at a distance of approximately twenty-five miles from the City of Seattle, and approximately twelve miles from the City of Tacoma, and situated on an interurban line of railway running between Seattle and Tacoma, affording rapid and convenient means of transportation. The Jovita Land Company secured and used during its existence ample and complete office accommodations in the City of Seattle, and in this office a room was set apart for R. E. Glass for his occupation and use as it might be required by him. The defendant, R. E. Glass, together with the defendant, Ridgway, were by all the employes of the company recognized as the directing officers. The employes, Bacharach and Lyons, together with all the other employes of the company, took their orders from either the defendant, Glass, or the defendant, Ridgway. The defendant, Ridgway, was seldom in the City of Seattle prior to the drawing, while the defendant, Glass, was continually and constantly in the City of Seattle, or on the property during the life of the company.

Immediately after the defendant, Ridgway, had

delivered the deeds to the five Trustees selected by the purchasers, the said five Trustees, so selected, proceeded to divide the property among the purchasers, by drawing lots therefor, in the following manner:

The name of each purchaser had prior to the day of the drawing been written upon separate cards and placed in a box, which revolved upon an axis; upon other cards had been written the description of each lot or tract of ground contained in the five hundred (500) acres, known as "Jovita," and placed in another similar box; that is to say: If there were 2713 lots sold, there were 2713 names put in one box and in another box there were placed 2713 cards, on each of which was written the description of a lot. These five Trustees then drew one name from one box and at the same time drew a card containing the description of a lot from the other box, and the purchaser whose name was drawn from one box was given a deed to the property described on the card drawn from the other box at the time his name was drawn.

The evidence connecting the defendants, Glass & Ridgway, with the transmission through the mail of the literature offered in evidence, as well as the specific letters and literature mentioned in the indict-

ment, was circumstantial and tending to support a knowledge on their part of the general character of the literature and letters. No direct evidence was offered that Glass and Ridgway personally deposited the letters or literature mentioned in the indictment in the mail or requested that these particular letters should be sent through the mail. The employees in the office testified that the defendants did not request them to send through the mail the particular letters and literature mentioned in the indictment. There were some ten employees maintained in the offices, and these employees had charge of the mailing of all matters sent from the office. The letters and circulars set forth in the indictment and introduced in evidence were matters which were sent out in the ordinary routine of the office. The defendant, Ridgway, was in the City of Seattle and Tacoma but a very few times, he residing in Spokane, several hundred miles away from the office. The defendant, Glass, made his home upon the property, and superintended the improvements that were being made upon the property, and when he came to Seattle he would come in on the Interurban, go to the office, sign the checks or attend to what might be absolutely necessary, and leave upon the next Interurban for the property; the Interurban train leaving every hour.

The witness, Salzer, testified that within the week prior to the drawing the defendant, Glass, handed to the witness a diagram of a platform and boxes, and requested him to construct upon the land of the defendant, Jovita Land Company, a platform which was afterwards used at the time of the drawing; the writing upon the diagram furnished was in the hand writing of Lyons, an employee. The witness, Salzer, testified that a few days prior to the drawing the defendant, Glass, asked witness to construct two revolving boxes of unusual design, the construction of which boxes was, at the instance of defendant, Glass, concealed from all the other employes. The boxes constructed by the witness, Salzer, were set upon the platform constructed by him and were actually used as boxes from which were drawn the names of the owners and the numbers of the lots on the day of the drawing. All of the persons who handled the deeds and tickets, after the tickets had been drawn from the boxes by the Trustees selected at the drawing, and who performed the physical work of filling them out and delivering them to the grantees on the date of the drawing, were employes of the company who were directed in the office of the company to be present on the Jovita land on the day of the drawing.

The defendant, Ridgway, called a meeting to order at the time of the drawing and was personally present during a good portion of the day. All of the witnesses for both sides agreed that at the time the meeting was called to order, tickets upon which had ben previously inscribed twenty-seven hundred and thirteen names, and other tickets upon which had been inscribed twenty-seven hundred and thirteen different pieces of property, were present and ready for use upon the morning of the drawing. No witness for either the government or the defense gave any explanation of the source from which the tickets had come.

The witness, McCash, called for the government, testified that prior to the drawing he had a conversation with the defendant, Glass, and the defendant, Glass had stated to the witness, McCash, that the customary way to dispose of lots under the circumstances was by drawing.

The evidence submitted by the government of various witnesses, including the real estate expert called, established the cost of the entire property, together with the comparative cost of the tracts as distributed, showing a variation from five to ten dollars an acre in the case of a great majority of the lots to one of an approximate value of five to six

thousand dollars, each tract of which of this wide disparity of value was distributed to the twenty-seven hundred and thirteen buyers upon a consideration which was in all cases the same, that is, one hundred and thirty dollars each.

A Mr. Bacharach was bookkeeper and in charge of the Seattle office, and a Mr. Lyons was in charge of the advertising, and a Miss Potts was the head stenographer and in charge of all routine correspondence and in charge of the office in the absence of Mr. Bacharach.

C. A. Stokes was called as a witness on behalf of the Government, who being sworn, testified that he had owned the property platted by the Jovita Land Company and known as "Jovita," and had negotiated with F. E. Hammond for the sale of the property, and had in the latter part of 1908 made a contract to sell the land to R. E. Glass, and placed in escrow deeds to the property, and after receiving full payment for the land, deeds conveying the land direct to the Jovita Land Company were delivered to the Jovita Land Company.

The witness was then asked to testify as to the amount of money he was paid for the land. To which interrogatories the defendants, and each of them duly objected, and objected to the introduction

of any evidence as to the purchase price of the land, paid by the Jovita Land Company, for the reason that it was irrelevant and incompetent and was offered for the purpose of prejudicing the minds of the Jury. The objections of the defendants were by the Court overruled. (P. 54 Tr.) To which ruling the defendants, and each of them, duly excepted, and their exceptions were allowed. The witness then testified that he had received One Hundred and Twenty Thousand Dollars ($120,000.00) for the land and improvements.

During the progress of the trial the Government called Adolph Behrans, who being sworn, testified that he had been in the real estate business in the City of Seattle for twenty-one (21) years, and at the request of Mr. Allen, United States District Attorney, he had, within the past ten days, examined the property sold by the Jovita Land Company. He was then interrogated as to the value of the land and the character of the soil at the time he made his investigation, for Mr. Allen, to which interrogatories the defendants, and each of them, then and there objected, and objected to the introduction of any evidence relative to the value of the land at the time of the said examination of the same by the witness, for the reason that it was incompetent, irrelevant

and offered for the purpose of prejudicing the Jury; which objections the Court overruled, and the said defendants, and each of them thereupon excepted to said ruling, and their exceptions were allowed. P. 54 Tr.) The said witness testified that said land was of the value of not to exceed Sixty-five ($65.00) Dollars per acre, and the forty (40) foot lots were not worth to exceed Five ($5.00) Dollars or Ten ($10.00) Dollars each, and the cottages upon the property could be built from Six Hundred ($600.00) Dollars to One Thousand ($1000.00) Dollars each. That the values in July, 1910, were but slightly less.

The Government then called as a witness upon its behalf, David Young, who being sworn, testified that he had been in the real estate business in the City of Seattle for about nine (9) years; that he had examined the property in company with the witness, Adolph Behrans, at the request of the United States District Attorney. He was then asked to give the value of the property and its general conditions, to which interrogatories the defendants, and each of them, objected, and objected to the introduction of any evidence as to the value of the land, for the reason that the evidence was incompetent and irrelevant and offered for the purpose of prejudicing the Jury; which objections were by the Court overruled,

and the defendants, and each of them thereupon excepted, and their exceptions were allowed. P. 54 Tr.) The witness then testified that in his opinion the land was worth not to exceed the sum of Seventy-five ($75.00) Dollars per acre, and that the forty (40) foot lots were worth not to exceed Four ($4.00) Dollars or Five ($5.00) Dollars each.

Carrie M. Buck, a witness called on behalf of the Government, testified that she had received through the postoffice establishment of the United States the literature set forth in Count Two (2) of the indictment, and the same was introduced in evidence as Government's Exhibit Fifty-five (55).

George Spicher and H. Giesy were called as witnesses on behalf of the Government, and testified to having received through the postoffice establishment of the United States the letter referred to in Count Seven (7) of the indictment, and the same was admitted in evidence as the Government's Exhibit Twenty-five (25).

Subsequent to the testimony of the said witnesses, Buck, Spicher and Giesy, the Government called as a witness Ira C. Luman, and the Government offered to prove by the said witness, Ira C. Luman, that he had received through the United States mails the literature referred to in Count

Three (3) of the indictment, and the literature referred to in Count Four (4) of the indictment, whereupon the defendants, and each of them objected to the introduction of any evidence as to Counts Three (3) and Four (4) of the indictment, for the reason that the said Count Two (2) and Count Seven (7) of the indictment, concerning which evidence had already been introduced by the Government, were based upon the law as in force prior to January, 1910, making the offense charged against the defendants a misdemeanor; whereas, the offense charged in Counts Three (3) and Four (4) of the indictment is a felony, and is based upon the law as in force subsequent to January, 1910, and the Government having proceeded to prosecute the defendants upon Counts Two (2) and Seven (7) of the indictment, for a misdemeanor, could not, also, prosecute the defendants in the same indictment for a felony. The Court overruled the objections of the defendants, and the defendants, and each of them thereupon excepted to the ruling of the Court, and their exceptions were allowed. (P. 55 Tr.) The witness then testified that he had received through the United States mail the literature in Counts Three (3) and Four (4) of the indictment, and the same was introduced in evidence as the Government's Ex-

hibit Sixty-three (63) and Sixty (60), respectively. (P. 48 to 56 inc., Tr.).

The defendants filed with the Court certain proposed instructions, which the Court refused to give, as set out on pages 56 to 61 inc. of Tr., to which refusal the defendants excepted. (P. 77 and 78 Tr.).

The Court instructed the Jury, as shown on pages 61 to 77 inc. of Tr., to parts of which instructions the defendants took exceptions as contained on pages 78 to 80 inc. of Tr.

The Jury returned a verdict of guilty on Counts Two (2), Three (3), Four (4) and Seven (7). (P. 29 Tr.).

The judgment of the Court was that the Plaintiff in Error, Glass, be confined in the King County Jail for sixty (60) days on each count, to be served concurrently, and pay a fine of Three Hundred ($300.00) Dollars on each count, totaling Twelve Hundred ($1200.00) Dollars. (P. 30 Tr.).

The original exhibits, consisting of literature alleged to have been prepared by the Company, including the various mail matter set out in the indictment, were by stipulation and order of Court, sent up in lieu of printed copies. (P. 86 and 87 Tr.).

The defendant, Glass, removed this case to this

Court by Writ of Error, and filed with his petition therefor his Assignments of Error. (P. 35 Tr.).

Summons and severance was duly served upon the defendant, Ridgway, but he has not joined in this appeal. (P. 33 Tr.).

SPECIFICATIONS OF ERRORS.

THE COURT ERRED:

I.

In overruling the demurrer of said defendants to the indictment filed against them in this cause.

II.

In holding and deciding over the objections of said defendants, that said indictment states facts sufficient to constitute a crime or offense against the United States or the laws thereof.

III.

In holding and deciding over the objections of said defendants, that the several counts of said indictment, or that any of said counts states facts sufficinent to constitute a crime or offense against the United States or the laws thereof.

IV.

In holding and deciding over the objections of said defendants, that said indictment was sufficient in law.

V.

In holding and deciding over the objections of said defendants, that Counts 2, 3, 4, 6, 7, 8, 9 and 10 of said indictment were sufficient in law, and in holding that any of said counts were sufficient in law.

VI.

In holding and deciding over the objection of said defendants, that said indictment was sufficient as a matter of law to permit the introduction of evidence thereunder against said defendants, and permitting over the objections of said defendants, evidence to be introduced thereunder against said defendants as to Counts 3 and 4, after the introduction of evidence as to Count 2 of said indictment.

VII.

In overruling the objections of said defendants to the introduction of evidence, and in admitting in evidence, over the objections of said defendants, plaintiff's Exhibit No. 55, purporting to be a letter from the Jovita Land Company to Carrie M. Buck,

and being the letter mentioned in plaintiff's Count 2 as having been unlawfully deposited in the United States Postoffice Establishment, contrary to law; said leter being in words, letters and figures as follows, to-wit:

"Payment No. 4 Seattle Wash.,

M— Carrie M. Buck,
212 S. Washington Ave.,
Centralia, Wash.

The next monthly payment of Ten Dollars on your Jovita Lot will be due on June 16th, 1909, and is payable at our Main Office, 219 Epler Block, Seattle, Wash.

Kindly remit by check, postoffice money order or express money order.

Yours truly,

JOVITA LAND COMPANY."

VIII.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence, over the objections of said defendants, plaintiff's Exhibit No. 63, the same having been offered after the introduction in evidence of Exhibit No. 55 and Exhibit No. 25; said Exhibits No. 55 and No. 25 being letters alleged to have been deposited in the United States Postoffice Establishment, con-

trary to law, and set forth in the indictment as Counts 2and 7 respectively, said Counts 2 and 7 being founded upon the law as in force prior to January 1st, 1910, and Count 3 of said indictment being founded upon the law as in force after January 1st, 1910. Said Exhibit No. 63 purporting to be a letter and receipt from the Jovita Land Company, and being the letter and receipt set forth in Count 3 of the indictment, as having been unlawfully deposited in the Postoffice Establishment of the United States.

IX.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence over the objections of said defendants, of plaintiff's Exhibit No. 25, the same purporting to be a letter from the Jovita Land Company to George Spicher and H. Geisy, and being the letter set forth in Count 7 of said indictment, and alleged to have been unlawfully deposited in the Postoffice Establishment of the United States.

X.

In overruling the objections of said defendants to the introduction in evidence and admitting in evidence over the objections of said defendants, plaintiff's Exhibit No. 60, the same purporting to be a

letter from the Jovita Land Company, bearing no address, but alleged to have been contained in an envelope addressed to Ira G. Luman, said Exhibit No. 60 being set forth in Count 4 of the indictment, and alleged to have been unlawfully deposited in the Postoffice Establishment of the United States.

XI.

In giving the following as part of its instructions:

> "In such case, the defendants being parties thereto, cannot excuse themselves from the criminality of their acts by turning over the property and withdrawing from further participation before the drawing actually took place. In other words, it is not a controlling consideration that deeds had been executed to all this property with the grantee left blank and handed to a trustee before the drawing, and that the defendants took no part in such drawing."

XII.

In giving the following as part of its instructions:

> "If the defendants devised this scheme for the distribution of the property for the purpose and with the intention and understanding that people would be attracted by it and would be induced to purchase interests or shares for the reasons, among other things, that in the drawing by resort to lot at which every contractor or shareholder would have a chance to draw a more

valuable piece of property, as well as a smaller piece of property, if you find beyond a reasonable doubt that they did devise and further such plan for such a purpose, and with such intent and understanding, and that such scheme was that described in the indictment, then you may find that they were engaged in a lottery or a similar scheme of offering prizes dependent in whole or in part upon lot or chance; even though you find they contemplated withdrawing and did actually withdraw from participation in the enterprise before the drawing was held, and that they took no part in the drawing."

XIII.

In giving the following as part of its instructions:

"You are further instructed in this connection that every sane person is presumed to intend the natural and logical consequences of his voluntary act; that is, if the defendants or either of them, in the conduct of this service must have contemplated that the United States mail would have to be used in the correspondence with the contracting parties for the purchase of an interest in this land, and that their, or either of their employees under general directions sent out this mail matter as that is described in the indictment, then you would be justified in finding, if the evidence is sufficient to convince you beyond a reasonable doubt, that they did cause those things to be mailed, although they did not direct any one particular piece of mail to be sent to a particular addressee."

XIV.

In giving the following as part of its instructions:

"If you find that they were trustees in the Jovita Land Company, and executive and managing heads, and exercised an active supervision and control over the corporation's affairs, they would be responsible for any general directions given in relation to the mailing of literature, whether they personally gave the directions to mail or not."

XV.

In giving the following as part of its instructions:

"Were they in good faith simply selling undivided interest in properties of which they were possessed, with no other inducement to purchasers than the value, or supposed value of the property or the merits thereof, or were they in bad faith, and under cover of legal form, knowingly and in reality appealing to the weakness of the passion prevalent in human nature, the gambling spirit, by which many people are easily induced to invest or to risk comparatively small sums upon the chance of winning a prize of much greater value."

XVI.

In giving the following as part of its instructions:

"You are instructed that the law does not, as a rule, permit proof to be given of what one

man has said or done in order to affect the matter. One can only be affected by what he has said or done himself. What one has said or done cannot be evidence against another unless he was acting with the other's authority, or in accordance with a plan which was adopted by both the parties which was common to both or all, and in which they were interested. When a thing which the parties have been doing separately and apart from each other, and in the interest of a common plan or purpose, or if you find that there was a common plan or purpose, can only be explained on the theory that they were acting in pursuance of such plan which they had previously adopted, and which was well understood, it may be found that they had previously adopted the plan disclosed by the evidence and which led to the result as described. One question, therefore, in this case is, whether the acts of the defendants when considered in their relation to one another, do fairly and convincingly indicate that they were acting in pursuance of a common plan and purpose, and that the defendants, Glass and Ridgway, were acting with relation to such plan, and to the advancement of a common plan and purpose in the advertisement and disposal of the property referred to in the indictment, and concerning which testimony has been received; and if these acts so fit together and match each other that the only reasonable explanation of them is that they were acting for and on behalf of each other and according to a well-understood and well-defined plan, if you are convinced by the evidence that such is the fact, then you may consider the act or the statement of one in furtherance of such a common plan as you may find, if any, to have been adopted as against the other defendant, whether the other defendant was present at the

time of the statement or at the time of the action or not, at the time the statement was made, or at the time that the act was done, or whether they were not."

XVII.

In refusing to give the defendants' proposed Instruction No. 4, which was as follows:

"I instruct you, gentlemen of the jury, that the scheme concerning which the law forbids any letters or circulars to be deposited in the mails is such a scheme as is similar to a lottery and offering prizes to those who participate in said scheme, the ultimate ownership of which prizes must depend upon lot or chance."

XVIII.

In refusing to give the defendants' proposed Instruction No. 5, which was as follows:

"I instruct you that any number of persons may buy jointly a tract of land in any condition and subsequently divide it among themselves by drawing lots, and the persons selling them the land, even though he knew they intended to divide it by a drawing or otherwise, would not commit a crime if he deposited or caused to be deposited any mail mater relative thereto in the Postoffice of the United States similar to that set forth in the indictment in this case."

XIX.

In refusing to give the defendants' proposed Instruction No. 6, which was as follows:

"I instruct you that in determining whether

there was a lottery or other similar scheme of chance devised or carried out; that where two or more persons who are the owners of undivided lots of land determine or arrange to apportion their respective interests therein among themselves, and the plan of so apportioning or dividing the same is by casting lots and thereby ascertain and apportion to each his interest in severalty by chance or lot, this is not a lottery or similar scheme of chance as contemplated by the law, for, the law contemplates that, in a lottery or other similar scheme, the title to the prize or property has not yet passed to the purchaser or person entitled to the chance and that it is by lottery or similar scheme of chance that the purchasers obtain the property or so-called prizes, and the law contemplates that the title, at the time of the lottery or other similar scheme of chance was had or held, was in some other than the purchaser or person taking the chance, and that the right which was held by the parties expecting or seeking prizes was merely a right to participate in the lottery or drawing, with the understanding or agreement, express or implied, that, thereafter, there would be conveyed or transferred to him the prize or property which might, by reason of such lottery or similar scheme, fall to him by reason of such drawing or scheme. That in all lotteries, or similar schemes of chance, as defined by law, there must be some party or parties holding, at the time of the allotment or drawing, the title to the prizes or property to be drawn, other than the persons among whom the prizes are to be awarded by lot or chance."

XX.

In refusing to give defendants' proposed Instruction No. 7, which was as follows:

"You are instructed that at the time the Jovita Land Company delivered deeds to the lots buyers all title to the land, houses and other improvements passed from the Jovita Land Company to the lot buyers and the lot buyers were then the absolute owners and entitled to the possession and control of the property; that thereafter all the lot buyers owned an undivided interest in each and every house or part or parcel of land, which included the alleged prizes alleged to have been offered; that upon the delivery of said deeds all control over the subsequent disposition of said property passed from said Land Company, or these defendants, and any purchaser, if he wished, could have gone into the State Court and had the land partitioned equitably among them or they had the right to divide it among themselves by lot."

XXI.

In refusing to give defendants' proposed Instruction No. 8, which was as follows:

"You are further instructed that at the time of the execution of each contract of sale of an undivided interest, the purchaser became the owner of an undivided interest in the land, houses and other improvements owned by the Jovita Land Company, and as long as the purchaser made his payments the Land Company could not divest him of his title and the purchaser's title was as complete in the alleged prizes as in the unimproved land; in other words, you are instructed that the purchasers from the time of their purchase at all times owned the alleged prizes, as well as the unimproved land and small tracts, and these pur-

chasers after obtaining title could lawfully allot their land among themselves as they might agree, without any control or interference upon the part of the defendants."

XXII.

In refusing to give defendants' proposed Instruction No. 9, which was as follows:

"You are further instructed that if the said purchasers had refused to allot their land by lot, chance or drawing, the Jovita Land Company could not have compelled them to hold a drawing, nor could the Jovita Land Company have held any drawing or apportionment that would have been binding upon the lot buyers."

XXIII.

In refusing to give defendants' proposed Instruction No. 10, which was as follows:

"This brings you to the consideration of the second question, viz.: Did the defendants, Ridgway and Glass, devise a scheme in connection with the sale of the land by which a drawing was to be conducted under their supervision, or that of their authorized agents and employees, as charged by the Government; or did the defendants, as claimed by them, simply sell to various and sundry persons undivided interests in the land platted by Jovita Land Company, leaving it to the purchasers themselves to partition said lots among themselves as they saw fit? Contracts of sale for said land have been exhibited to you, which it is claimed the Land Company executed, which contracts purported by their terms to sell but an undivided interest

in the land platted, and which provided further that the several purchasers should meet and partition the land as they saw fit. These contracts further provide that no selling agent has any power to alter or change their terms. The defendants further deny that they or either of them at any time authorized any agents to vary, change or modify the terms of such contracts, and deny any knowledge that any such agent had ever attempted so to do. The defendants further deny that they or either of them had anything whatever to do with any drawing or the division of said lots, and deny that the plan therefor was their plan, or that they supervised it, or that the same was supervised with their knowledge or consent by any agent or employee of theirs or of said Land Company.

You are accordingly instructed that if you find that defendants did in good faith sell undivided interests in the property platted by said Land Company, and that the plan of allotment was not their plan, but a plan adopted and carried into effect by the purchasers for the purpose of partitioning the property among themselves, your verdict must be for the defendants."

XXIV.

In refusing to give defendants' proposed Instruction No. 10½, which was as follows:

"If, however, on the other hand, you should find that there was a lottery scheme offering prizes and that it was the scheme of the defendants, or either of them, and that they or either of them sold the property to the several purchasers in contemplation that the same would be alloted by chance and that thereafter

a drawing was held prior to the transfer of title from the Land Company to the purchasers and that the defendants or either of them arranged and supervised such drawing or caused the same to be done, and that in connection with the sale of said property the defendants, or either of them, within three years prior to May 20, 1912, deposited or caused to be deposited in the United States mails letters and circulars as alleged by the Government for the purpose of furthering and aiding such scheme, then I instruct you the defendants would be guilty of the crime charged, and in this connection I instruct you that the delivery of deeds to the authorized representatives of the purchasers would be the same as a delivery of the deeds to the actual purchasers of the lots."

XXV.

In refusing to give defendants' proposed Instruction No. 11, which was as follows:

"I instruct you that unless you can find that the defendants personally deposited the mail matter or directed some one else to do so you must acquit the defendants."

XXVI.

In refusing to give defendants' proposed Instruction No. 12, which was as follows:

"You are instructed that it is not a crime to deposit a letter or circular concerning a lottery that has been held. To illustrate: Suppose a lottery has been held and, in writing a letter to a friend or acquaintance, you mention the fact that a lottery has been held; you would in that

case not be violating the law, although the letter would be in a sense 'concerning a lottery.'' Nor is it a crime to deposit or cause to be deposited a letter concerning a legitimate allotment of land or property among the owners thereof. To illustrate: If the various owners of a tract of land decide to divide it among themselves by a drawing or a casting of lots, that would be a legitimate allotment or lottery, and it would not be a crime to deposit or cause to be deposited in the Postoffice a letter or circular concerning such a lottery or plan, even though the letter was one which was promoting the scheme or plan of distribution and the tracts of land to be divided were of unequal value.''

XXVII.

In refusing to give defendants' proposed Instruction No. 14, which was as follows:

''I instruct you that the law presumes that the Jovita Land Company and the purchasers intended to carry out their contract in a lawful manner and the Government must overcome this presumption by evidence that convinces you beyond a reasonable doubt, and it is presumed by law that all parties connected with the sale or purchase of the land believed and contemplated that after the delivery of the deeds the land would be partitioned among men in a legitimate manner.''

XXVIII.

In refusing to give defendants' proposed Instruction No. 18, which was as follows:

''I instruct you that the mere fact that these defendants were officers of the corporation

known as the Jovita Land Company is not of itself sufficient to prove that they knew that there was in existence a scheme similar to lottery, being conducted by the Jovita Land Company, nor is it sufficient to prove that they deposited or caused to be deposited the letters or circulars set forth in the indictment."

XXIX.

In refusing to give defendants' proposed Instruction No. 19, which was as follows:

"The mere reception of the matter, alleged to have been deposited in the mail, by the person to whom it was addressed, would not of itself establish the fact that defendants deposited or caused to be deposited such matter in the mails."

XXX.

In refusing to give defendants' proposed Instruction No. 20, which was as follows:

"You are instructed that if you find from the evidence that at or about the time the Jovita Land Company began the sale of its lots, these defendants, or either of them consulted with lawyers for the purpose of advising them or either of them as to whether or not the sale of land under the contracts in evidence was legal and not in violation of law, and that said defendants, or either of them, were advised by counsel learned in the law that it would not be in violation of law to sell their land under such contracts, and that if the said Land Company and these defendants did not participate in the allotment of the land that neither the company or these defendants would be violating the law,

regardless of what the purchasers might do, then and in that case your verdict should be an acquittal of these defendants, or either of them."

XXXI.

In refusing to give the defendants' proposed Instruction No. 22, which was as follows:

"I instruct you that the defendants in this case are entitled to the individual opinion of each member of the jury as to their guilt or innocence, and if any juror entertains a reasonable doubt as to their guilt of any one of the necessary elements of the crime charged he should not vote for a verdict of guilty merely because any other or other jurors, even a majority of them, believed the defendants guilty."

XXXII.

In refusing to give defendants' proposed Instruction No. 24, which was as follows:

"You are instructed that there is nothing contained in the letters or circulars set out in the indictment that is even suggestive of a scheme similar to a lottery offering prizes dependent upon lot or chance, nor on their face are they concerning such a scheme.

Standing alone, by themselves, the defendants would commit no crime by depositing in the mails such letters or circulars, therefore, you must look to other evidence to determine if the said letters and circulars are concerning a scheme similar to a lottery, as charged in the indictment."

In refusing to give defendants' proposed Instruction No. 28, which was as follows:

> "I instruct you that if from the evidence or statements of Counsel you have gained the impression that the Jovita Land Company or either of these defendants lost money or gained money by reason of the alleged transactions, you must entirely disregard it for any purpose for the reason that whether they gained or lost by the transaction has nothing to do with the case; neither does it make any difference whether or not the property sold by the Jovita Land Company was worth the amount it was sold for. There is no charge of fraud in the indictment against these defendants and there is no evidence upon which you would be justified in presuming any fraud."

XXXIV.

In pronouncing a judgment against the said defendants, and each of them.

ARGUMENT.

Specifications of error One (1) to Ten (10) inclusive will be considered under the one head.

Specifications Six (6) to Ten (10) inclusive deal with the introduction of evidence, but the same question was raised upon demurrer, as it appears upon the face of the indictment.

Error in Overruling Demurrer.

Counts Two (2) and Seven (7) of the indict-

ment are founded upon Sec. 3894 of R. S., as they allege the crime was committed in the year 1909 and are misdemeanors.

Counts Three (3) and Four (4) are founded upon Sec. 213 of the Penal Code, as they allege the crime was committed subsequent to January 1st, 1910, when Sec. 213 went into effect, and are felonies.

Section 3894 R. S.

"No letter, post card or circular concerning any lottery, so-called gift-concert, or other similar enterprise offering prizes dependent upon lot or chance * * * shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter-carrier. * * * Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than $500, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense."

Section 213 Penal Code.

"No letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent *in whole or in part* upon lot or chance * * * shall be deposited in or carried by the mails of the

United States, or be delivered by any postmaster or letter carrier. Whoever shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent anything to be conveyed or delivered by mail in violation of the provisions of this Section, or shall knowingly deliver or cause to be delivered by mail anything herein forbidden to be carried by mail, shall be fined not more than $1000, or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years."

The objections to the Indictment are:

First: That there is a misjoinder of offences, that is, a felony has been joined with a misdemeanor.

Second: The crimes charged under Section 213 of the Penal Code (Counts Three (3) and Four (4)) being felonies (Sec. 335 Penal Code), the indictments must specifically allege in what manner the letters alleged to have been deposited *concerned* a scheme similar to a lottery offering prizes, inasmuch as the letter itself contains no words concerning any lottery or similar scheme.

U. S. vs. Noelke, 1 Fed. 426, 432.

This case was decided under the old statute, but applies to this point.

Third: It is not specifically alleged that the defendant knew the letters were concerning a scheme

offering prizes, or that he knew the contents of the sealed envelope or the letter, he not having written the letter, and not being the person alleged to be conducting the alleged scheme. The scienter should be specifically alleged.

Fourth: Each count is bad for duplicity. The defendants being each indicted jointly and accused of *"depositing"* and *"causing to be deposited,"* two separate crimes are charged.

Fifth: The alleged scheme as set out in the indictment is not a scheme similar to a "lottery," or "gift-enterprise," *offering prizes* dependent upon lot or chance, within the meaning of the Statute. The scheme as set out in the indictment being a straight sale of real estate with a contract among the purchasers to partition the land among themselves.

By comparing Section 3894 of R. S. with Section 213 of the Penal Code it will be noted that so far as this indictment is concerned the only difference seems to be that Section 3894 was a misdemeanor, while Section 213 is a felony, and the further difference that in Section 3894 it is provided that: No leter, etc., concerning any lottery, so-called gift-concert or other similar enterprise offering prizes *"dependent upon lot or chance"* could be carried in the mail; while in Section 213 it was

provided that: No letter, etc., concerning any lottery, gift-enterprise or similar scheme offering prizes dependent *in whole or in part* upon lot or chance, could be deposited in or carried by the mails. In other words, under Section 3894 R. S. the *prizes* offered must depend *entirely upon lot or chance,* while under Section 213 of Penal Code the *prizes* offered might be dependent *in whole or in part upon lot or chance.* The proof required under Section 3894 R. S. would be different than the proof required under Section 213 of Penal Code, and the Court in its instructions (P. 63 Tr.) instructed the jury that *all* the counts in the indictment were based upon Section 213 of the Penal Code, and then proceeded to quote the section to the jury; whereas, the indictment was founded, not only upon Section 213, but upon Section 3894 of R. S. The indictment does not charge in any count that the scheme depended "in whole or in part" upon lot or chance. These words are omitted in each count.

Upon the trial of the cause the Government introduced its evidence first as to Counts Two (2) and Seven (7), which were founded upon Section 3894 R. S., being a misdemeanor (P. 55 Tr.). Thereafter the Government offered evidence as to Counts Three (3) and Four (4), which was based upon Section 213

of the Penal Code, the same being a felony. (P. 55 Tr.) Sec. 335, Penal Code.

Objections were made to the introduction of the evidence as to Counts Three (3) and Four (4), as the Government had elected to prosecute the defendants under Section 3894 R. S. The objections were overruled by the Court, and evidence received as to Counts Three (3) and Four (4). (P. 55 Tr.)

The indictment shows upon its face that a misdemeanor and felony were joined, and plaintiff in error contends that the demurrer should have sustained for that reason:

> "If a count for felony is joined with a count for a misdemeanor, the indictment will be held bad if demurred to, or judgment may be arrested if the verdict has been general; (i. e. guilty or not guilty on the whole indictment)."

1st Ed. Amer. & Eng. Ency. L. (Note) p. 755, Vol. 4.

U. S. vs. Gaston (1886), 28 Fed. 848, citing many cases.

McElroy vs. U. S., 17 Sup. Court Rep. 31 (1896).

> "There is no objection to stating the same offense in different ways, in as many different counts of the indictment as you may think neces-

sary, even although the judgment on the several counts be different, provided *all* the counts be for *felonies* or *all* for misdemeanors."

U. S. vs. Howell, 65 Fed. 402 (1895), Judge Morrow.

See also *Painter vs. U. S.,* 151 U. S. 396; 14 Sup. Ct. 410 (1894).

"Conceding that regularly and usually an indictment should *not* include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different *felonies,* at least of the same *class* or *grade,* and subject to the *same* punishment, is not *necessarily* fatal to the indictment upon demurrer."

Painter vs. U. S., 151 U. S. 396; 14 Sup. Ct. 410 (1894).

The Painter case was one in which two felonies were joined in separate counts in one indictment.

Under Sec. 1024 R. S. several counts may be joined in the same indictment:

1st: "Where there are several charges against any person for the *same* act or transaction."

2nd: Where there are "two or more acts or transactions connected together";

3rd: Where there are "two or more acts

or transactions of the same *class of crimes* or offenses."

4th: In each case the acts or transactions must be such as "may be properly joined."

McElroy vs. U. S., 17 Sup. Ct. Rep. 31.

However, if the Court should hold that it was proper to join in the same indictment a misdemeanor with a felony, surely at the time of the trial, when the Government had elected to prosecute the defendants under the misdemeanor, it was error for the Court to subsequently permit the introduction of evidence as to a felony.

Richardson vs. The State, 63 Ind. 192.

It is not contended that one charged with a felony cannot be convicted of a lesser crime if included within the felony, but it is contended that two separate crimes of a *different class,* one a felony and one a misdemeanor, cannot be joined in the same indictment in separate counts.

> "In most of the States and Territories, by Constitution or Statute all crimes, or at least statutory crimes, not capital, are classed as felonies, or as misdemeanors, accordingly as they are or are not punishable by imprisonment in the State prison or penitentiary."

Mackin vs. U. S., 117 U. S. 348, 29 L. Ed. 909.

An analysis of Sections 3894 of R. S. and 213 of Penal Code discloses that there are three things concerning which mail matter shall not be "deposited in," "carried by" or "delivered by" the Postoffice Establishment:

1st: "Lottery."

2nd: "Gift-enterprise."

3rd: Similar schemes *offering prizes,* dependent (in whole or in part) upon lot or chance.

No mail matter concerning either of the three foregoing enterprises is allowed to be:

1st: "Deposited in" or

2nd: "Carried by the mails of the United States" or

3rd: "Delivered by any post-master or letter-carrier."

The words "deposited in" are not found within the prohibitive part of Section 3894 of R. S., but both Section 213 of Penal Code and Section 3894 of R. S., are substantially the same in providing that whoever shall knowingly "deposit" or "cause to be deposited," or "deliver" or "cause to be deliv-

ered'' by mail, anything ''in violation of the provisions of this Section,'' shall be punished.

SCIENTER.

In the present case the Government has *attempted* to accuse the plaintiff in error of having deposited or caused to be deposited certain mail matter concerning a *scheme* similar to a lottery (offering prizes dependent upon lot or chance). These are the words of Section 3894, R. S., and not the words of Section 213 of the Penal Code. The wording of Sec. 213 of Penal Code being ''dependent *in whole or in part* upon lot or chance.'' The defendant is not even accused of depositing any mail matter concerning a scheme similar to a *lottery* or *gift-enterprise* offering prizes dependent upon lot or chance. It will be observed by examining the Statute that it is *the prizes,* which must be *dependent* upon *lot* or *chance,* which the law refers to. It is not the *scheme* that must be dependent upon lot or chance, but the *prizes.* In other words, it would be no offense to deposit a letter concerning a *scheme* dependent in whole or in part upon lot or chance, unless the scheme is similar to a lottery or gift enterprise and is a scheme *offering prizes.* The in-

dictment in this case charges that the defendants did:

> "Wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited * * * a certain circular concerning a certain *scheme* dependent upon lot or chance, then and there being operated and conducted * * * by a corporation called Jovita Land Company."

It is nowhere charged that the plaintiff in error *knew* the letter deposited was concerning a scheme (offering prizes), nor that he knew that it was a scheme *similar to a lottery* or *gift enterprise.* The mail matter set out in the indictment does not appear to have been written by the plaintiff in error, and surely no one has the temerity to claim that, if the plaintiff in error did not know the scheme was *offering prizes,* that he would have committed an offense by merely depositing or causing the mail matter to be deposited in the post office establishment.

> "Every ingredient of which the offense is composed must be accurately and clearly alleged."

U. S. vs. Cook, 17 Wall. 174, 21 L. Ed. 538.

U. S. vs. Cruikshank, 92 U. S. 524, 23 L. Ed. 588-593.

U. S. vs. Kelsey, 42 Fed. 882.

> "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially or by way of recital."

U. S. vs. Hess, 124 U. S. 483, 486, 31 L. Ed. 516.

The indictment in this cause omitted to set forth one of the most essential ingredients of the offence, that of charging the scheme was one similar to a lottery or gift enerprise and was one *offering prizes.* The indicment should specifically state that the defendant *knew* that the contents of the letter concerned a scheme *offering prizes* dependent (if under Section 3894, R. S.) upon lot or chance; or (if under Section 213 of the Penal Code) dependent *in whole or in part upon lot or chance*, and that the said scheme was one similar to a lottery or gift enterprise, especially is this true when the letters were not written by the defendants, nor were they conducting the scheme, but the scheme was being conducted, as alleged in the indictment, by a corporation known as *"Jovita Land Company."* The indictment before the court contains no such specific allegation, and when the defendant went to trial, he could not have been convicted by merely

proving the allegations of the indictment, but the Government had to go further and prove this "guilty knowledge" upon the part of the defendant.

The plaintiff in error further contends that the demurrer should have been sustained for the reason that the scheme set forth in the indictment and relied upon by the Government, is not a scheme similar to a lottery *offering prizes* dependent in whole or in part upon lot or chance.

SPECIFICATIONS OF ERROR 11, 12, 23 AND 24.

These specifications of error raise the question as to whether, under the indictment, it was error for the court to instruct the jury, in substance, that they could find the defendants guilty, even though the drawing was not conducted "under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees," and even though said drawing took place *after* the deeds conveying the property had been delivered to the purchasers. This seems clearly to be error. The indictment (P. 3 Tr.) specifically charged that "after all of said lots were so sold and contracted to be sold, a drawing should be had by which said lots should be parceled out to each purchaser, by

lot or chance, which said drawing was to be conducted on said property *under the supervision of said W. A. Ridgway and R. E. Glass and their agents and employees," that after said drawing* a deed or deeds should be issued to each purchaser conveying to him the lot or lots so drawn by him"; as a matter of fact if we eliminate from the indictment the accusation that the drawing was to be conducted under the supervision of the defendants or their agents, and the further allegation that the deeds were to be delivered *after* the drawing, the indictment would be clearly demurrable. An analysis of the indictment which describes the *scheme* which is supposed to be similar to a lottery offering prizes dependent upon lot or chance shows:

1st: The defendant should acquire in the name of a corporation certain vacant and unimproved real estate. (The corporation would then, of course, own it.)

2nd: The land was to be platted into lots and blocks. (Naturally the lots would be of unequal value.)

3rd: Twenty-four (24) houses of different value were to be built upon as many different lots.

4th: The corporation who operated the scheme

was to offer said lots *for sale* for One Hundred and Thirty ($130.00) Dollars.

5th: At the time of such *sale* the lot or lots so purchased should not be identified.

6th: But after all of said lots were sold, a drawing should be had by which the said lots should be parceled out to each purchasre by lot or chance.

7th: The drawing was to be conducted on said property under the supervision of the defendants, Ridgeway and Glass.

8th: Deeds were afterwards to be issued to each purchaser, conveying to him the lot so drawn by him.

The defendant contends that under all the rules of "criminal law," it was incumbent upon the government to prove that the drawing or distribution of this property was conducted under the *supervision* of the *defendants* and *their agents and employes.*

The evidence in the trial of the case (P. 50 Tr.) was that, "The defendant, Glass, was at his home but not personally present at the drawing," and that "on the day of the drawing, between eight and nine o'clock in the morning, the defendant, Ridgway, announced to the purchasers there as-

sembled, that the company was ready to turn over the deeds to the Trustees who might be chosen by the people there assembled, (this was provided for in the contracts, Govt. Ex. 23). By *viva voce* vote five Trustees were chosen from among the persons present. These Trustees were then called forward and the defendant, Ridgway, delivered to these Trustees, deeds to each and every lot or tract of the property sold, and took their receipt for the same. After these deeds were delivered to the Trustees, the defendant, Ridgway, withdrew from any further participation in the subsequent proceedings, and went to Tacoma, Washington, but subsequently, during the day, returned to the property." (P. 50 Tr.). "Immediately after the defendant, Ridgway, had delivered the deeds to the five Trustees selected by the purchasers, the said five Trustees so selected, proceeded to divide the property among the purchasers, by drawing lots therefor, in the following manner (P. 51 Tr.):

It is clear that under the evidence as produced at the trial, the defendants would have been acquitted had the court instructed the jury that the Government must prove the allegations in the indictment, viz., that before the jury could convict, the defendants and their agents must be proven to have

supervised the drawing. On the contrary, the court gave as part of its instructions the following (P. 67 Tr.):

> "In such case, the defendants being parties thereto, cannot excuse themselves from the criminality of their act, by turning over the property and withdrawing from further participation before the drawing actually took place. In other words, it is not a controlling consideration that deeds had been executed to all this property with the grantee left blank and tendered to the Trustees before the drawing; that the defendant took no part in such drawing."

Again, on page 69 Tr., the court instructed the jury that:

> "Under certain conditions the jury must find that they (the defendants) were engaged in a lottery or a similar scheme of offering prizes dependent in whole or in part upon lot or chance; even though the jury should find they (the defendants) contemplated withdrawing, and did actually withdraw from participating in the enterprise before the drawing was held, and that they took no part in the drawing."

It is quite clear that these instructions took from the jury, entirely, the question presented by the indictment, as to whether or not the drawing was conducted under the supervision of the defendants and their agents.

The court refused to give the instructions asked

for by the defendant, and set forth in the Specifications of Error 23 and 24.

The defendant was entitled to rely upon the allegations in the indictment that the *scheme* as set forth in the indictment was *the scheme* concerning which the mails were used, and it was error for the court to withdraw *that scheme* from the consideration of the jury and substitute another therefor. An acquittal under this indictment would not be a bar to a subsequent indictment accusing the defendants of depositing the same letter concerning the scheme as *proven* in the trial, but not *set forth* in this *indictment.*

If the indictment is sufficient and does set forth a scheme similar to a lottery offering prizes dependent upon lot or chance, yet, the court erred in refusing to give the instructions as set forth in

SPECIFICATIONS OF ERROR 17, 18, 19, 20, 21 AND 22.

These specifications of error, which are instructions the court refused to give, are deemed by plaintiff in error as quite important, as they cover the proposition that the scheme as proven by the evidence was not a scheme *offering prizes* dependent upon lot or chance.

It is contended that the plaintiff in error, Glass, and his co-defendant, Ridgway, could, on behalf of themselves and other stockholders, have purchased a tract of land in the name of "Jovita Land Company"; could have sub-divided it into tracts of unequal size, built houses upon some of the tracts, and offered the land to the public for sale, and could have sold undivided interests in the tract to as many people as there were sub-divisions of the plat, and could have had an arrangement or understanding with the people who bought the undivided interests, that when all the land was paid for, the corporation would deliver deeds to the representatives of the people who had bought those interests, and that thereafter the people who had bought the undivided interests could divide the land among themselves by a drawing or in any other manner they might see fit.

Indeed the court instructed the jury (P. 67 Tr., bottom of page) that under a proper interpretation the contracts (Exhibit 23) entered into between the Jovita Land Company and the purchasers does not provide for a drawing or distribution by resort to lot or chance, and in itself the instrument implies nothing illegal or wrong on the part of the defendants.

The contention of plaintiff in error being that

no *prizes* of any kind, *dependent* in whole or in part upon lot or chance, were ever *offered* or given under this arrangement or under the evidence as introduced at the trial. The Government contended that the prizes consisted of the houses upon the land; or, that by reason of one tract being larger than another and of more value, it thereby constituted a prize. The plaintiff in error contends that when said corporation sold the undivided interests in the tract of land, those undivided interests carried with them the title to the houses and all the improvements put upon the property. If the plaintiff in error and the "Jovita Land Company" had *withheld* from the purchasers anything to be given to someone holding a lucky number after a drawing or division of the property had been made, it would have been a different matter, and they would have been offering a prize to someone who drew a certain number; but *after* the land was all *sold* and when the corporation had *delivered the deeds* to the Trustees, appointed by the purchasers themselves, the corporation held back *nothing* to give to anyone after the division had been made, and there was no *prize* of any kind ever offered or given. Therefore, it was essential that the drawing, as alleged in the indictment, should have been under the *supervision and direction* of the

defendants, their *agents* and *employes,* and something should have been retained by them as a *prize* to be given to the person who drew a lucky number. If no *prizes* were offered or given, then, the United States mails could be used concerning this transaction, because the scheme or plan would not be one similar to a lottery, *offering prizes* dependent upon lot or chance. Therefore, it was error for the court to refuse to instruct the jury, as set forth in Specification No. 17, that the scheme about which the law forbids the use of the United States mails, "is such a scheme as is similar to a lottery and *offering prizes* to those who participate in said scheme, the ultimate ownership of which prizes must be dependent upon lot or chance"; and as set forth in Specification No. 18, "that any number of persons might buy, jointly, a tract of land, divide it among themselves by drawing lots and the person selling them the land, even though they knew they intended to divide it by drawing or otherwise, would not commit a crime if he *deposited* or *caused to be deposited* in the post office establishment of the United States any mail matter relative thereto.

And as set forth in Specification No. 19, that, "in all lotteries or similar schemes of chance, as defended by law, there must be some party or parties

holding, at the time of the allotment or drawing, the title to the prizes or property to be drawn, other than the persons among whom the prizes are to be awarded by lot or chance."

And as set forth in Specification No. 20, that, the delivery of the deeds by the 'Jovite Land Company' to the purchasers passed the title to the land, houses and other improvements upon the property, and that the purchasers of the property could have controlled the subsequent disposition of the property in any manner they might see fit."

And as in Specification No. 21, that, "from the time of the execution of the contracts and as long as the purchaser made his payments the equitable title to the alleged prizes, as well as in the unimproved land was in the purchasers, and that the purchasers could allot the land among themselves as they might agree, without any control or interference upon the part of the defendants."

And as in Specification No. 22, that, "the purchasers could have refused to allot their land by lot, chance or drawing, and neither the defendants nor the Land Company could have compelled them to have held the drawing."

The evidence in the case discloses the fact that

after the sale of the land, deeds to the property were delivered to the purchasers *prior* to any drawing, and neither the defendants in the case nor the Land Company had anything further to do with the division of the property among the purchasers, except that *after the drawing* some of the office force of the Land Company, other than the defendants, assisted in some of the clerical work.

SPECIFICATIONS 13, 14, 15, 25 AND 28.

The plaintiff in error (Specification No. 25), requested the court to instruct the jury that unless it could find that the defendants personally deposited the mail matter, or directed someone else to do so, the jury should acquit the defendants.

This instruction should have been given for the reason that the indictment in effect charges them with *personally depositing* the letters or mail matter. The words in the indictment "or caused to be deposited" were of no force as the indictment did not state the names of the persons who were *caused to deposit* the letters, or that their names were to the Grand Jury unknown.

U. S. vs. Simmons, 96 U. S. 360.

And further requested the court to instruct (Specification No. 28), that the mere fact that the

defendants were officers of the corporation would not have been sufficient of itself to prove that the defendants deposited or caused to be deposited the letters or circulars set forth in the indictment. These instructions were by the court refused, and in lieu thereof the court instructed the jury (Specification No. 13), that if either of the defendants in the conduct of the business must have contemplated that the mails were to be used in corresponding with the contracting parties for the purchase of the land, and that their employes under general directions sent out the mail matter, the jury would be justified in finding that the defendants caused those things to be mailed, although they did not direct any particular piece of mail to be sent. And further (Specification No. 14), that if the defendants were Trustees of the "Jovita Land Company," and executive and managing heads and exercised an active supervision and control over the corporation's affairs, they would be responsible for any general directions given in relation to mailing of literature, whether they personally gave the directions to mail or not.

The plaintiff in error believes that prejudicial error was committed in refusing to give the instructions asked and in giving the ones herein referred to.

SPECIFICATION 16.

This part of the court's instruction gave the jury to understand that anything that either of the defendants did would be binding upon the other. The position of the plaintiff in error, Glass, is that after the land was sold, he had nothing further to do with the delivery of the deeds or the distribution of the property. The evidence (P. 50 Tr.) discloses, that after the sale, on the day the deeds were delivered and the drawing had, the plaintiff in error, Glass, was not at the drawing, nor did he participate in the delivery of the deeds, nor in any other part of the procedure. He was at his home and took no part whatever; while the defendant, Ridgway, was present, delivered the deeds, but before the drawing, withdrew and went to Tacoma, Washington. Anything that the defendant, Ridgway, may have stated at that time, or at any other time, would not have been binding upon the plaintiff in error, Glass.

SPECIFICATION NO. 31.

The court refused to instruct the jury that the defendants were entitled to the individual opinion of each member of the jury as to their "guilt" or "innocence," and that no juror should vote for

conviction merely because some other member of the jury believed the defendants "guilty."

SPECIFICATION NO. 33.

In view of the evidence given by the real estate men called b ythe Government (P. 54 Tr.), which was as to the cost of the land and the value of the land, it was error for the court to refuse to instruct the jury that if the jury had gained the impression that the plaintiff in error, Glass, and his co-defendant, Ridgway, lost or gained money by reason of the alleged transactions, the jury should disregard it. The court had admitted in evidence, tesimony which shows that a large quantity of land (2,713 tracts at $130.00 each) had been sold for approximately Three Hundred Fifty-two Thousand Dollars ($352,000.00); that this land, not including the improvements put on after purchase, had only cost the corporation something like One Hundred Twentv Thousand Dollars ($120,000.00) (Evidence of Stokes, p. 53 Tr.), and the insinuations of the District Attorney and the purpose of the evidence was to get into the minds of the jury the thought that these defendants had made a vast fortune out of this real estate transaction, when as a matter of fact, after paying salesmen, employes, improvements, etc.,

the company that owned the land lost money. The admission of this evidence and the refusal of the court to give defendants' proposed instructions, was prejudicial error. The real estate men testified the lots were not worth over $5.00 each, which would make the 2,713 lots worth about $13,565.00. So far as the issues in the case were concerned, it made no difference whether the land cost much or little. The only question was whether or not these defendants caused to be deposited in the post office establishment of the United States, any mail matter concerning a scheme similar to a lottery *oeffring prizes* dependent upon lot or chance, and the evidence of the real estate men was prejudicial to the plaintiff in error.

SPECIFICATION 34.

The court erred in ordering the defendant confined at *hard labor,* as the statute does not authorize such punishment. The punishment prescribed by both Section 3894, R. S., and Penal Code, 213, is a fine or imprisonment or both.

In re James S. Wilson, 114 U. S. 417, 29 L. Ed. 89.

Mackin vs. U. S., 117 U. S. 348, 29 L. Ed. 909.

It is respectfully submitted the cause should be reversed and dismissed.

F. E. HAMMOND,

Attorney for Plaintiff in Error.